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IN THE

Supreme Court of the United States

NO. 641 [redacted].

WILLIAM D. HALL,

Petitioner,

v.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William D. Hall, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 31, 1967, and upon which a petition for rehearing was denied on June 26, 1967.

OPINIONS BELOW

The District Court for the Southern District of Indiana, Indianapolis Division, did not write an opinion on its order. The opinion of the Court of Appeals for the Seventh Circuit, from which this writ of review is sought, is not reported. A copy of said opinion is attached hereto as Appendix I and appears at page 1a; a copy of the order denying the petition for a rehearing is attached hereto as Appendix II and appears at page 3a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered on May 31, 1967. The petition for rehearing was filed on June 14, 1967. This petition was denied and entered by the Court on June 26, 1967. The jurisdiction of this Court is invoked under Title 28 U.S.C.A., §§1254(1) and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether the matters embraced within the pending suit are closely and substantially related to the subject matter included within an area of my previous representation of NFO.

(2) If the answer to Question Number (1) is in the affirmative, then does the rationale of *Consolidated Theaters* vs. *Warner Bros. Circuit Management Corporation*, 2 Cir., 216 F. 2d 920; *Cord* vs. *Smith*, 9 Cir., 338 F. 2d 516; and *T. C. Theatre Corp.* vs. *Warner Bros. Pictures, Inc.*, D.C.S.D. N.Y., 113 F. Supp 265, support the order of the Circuit Court of Appeals, or was I required or permitted to inform the members on matters made

the subject of this action and to represent them in an action for declaratory judgment on behalf of NFO to correct them?

(3) Does the fraud, misrepresentation, and concealment of material facts from the members by management and other illegality appearing in the record create an exception to the attorney-client privilege premitting me, as a former attorney of NFO, to represent the membership in this action for declaratory judgment for and on behalf of NFO?

STATUTES, REGULATIONS, AND FEDERAL RULES INVOLVED

Title 15, U.S.C.A., §13(c):

> "*Payment or acceptance of commission, brokerage or other compensation.*—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid."

Title 28, U.S.C.A., §1254(1):

> "*Courts of appeals—Certiorari—Appeal—Certified questions.*—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28, U.S.C.A., §1651(a):

"*Writs.*—(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28, U.S.C.A., §2101(c):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Chapter 504, Laws of the State of Iowa, §504.8:

"*For agricultural, horticultural, and cemetery purposes.* Corporations organized for agricultural or horticultural purposes, and cemetery associations, shall not own to exceed nine sections of land, and the improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may at any time withdraw therefrom, and also the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof to him, subject to the right of creditors of the corporation; and their duration shall be without limit, unless terminated by act of the general assembly."

Chapter 504, Laws of the State of Iowa, §504.10:

"*Dividend.* No dividend or distribution of property among the stockholders shall be made until the dissolution of the corporation."

Article IX of NFO's Articles of Incorporation:

"No dividend or distribution of the property of this corporation shall ever be made among the officers or members of this corporation until dissolved and the private property of the officers and members hereof shall be exempt from the debts and liabilities of this corporation."

Article XI of NFO's Articles of Incorporation:

"Any of these Articles except Article IX, may be amended, changed or repealed at any annual meeting of the corporation, or at any special meeting called for that purpose."

Canon 16 of the Canons of Professional Ethics, as amended, ABA:

"A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Court, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation."

Canon 32 of the Canons of Professional Ethics, as amended, ABA:

"No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a

public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

Canon 41 of the Canons of Professional Ethics, as amended, ABA:

> "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

STATEMENT

The National Farmers Organization, Incorporated, (hereinafter referred to as "NFO"), was incorporated under Chapter 504 of the laws of the State of Iowa in November, 1955. It is entitled, "Corporations Not For Pecuniary Profit", and it is not one of Iowa's laws governing agricultural cooperatives. The prohibitions in Ar-

ticle IX and Article XI of NFO's Articles of Incorporation are in accord with the prohibitions set out in Section 504.8 and Section 504.10 of the Iowa Code. On November 18, 1958, Article III of NFO's Articles of Incorporation was amended in order to permit it to enter into collective bargaining, on a non-profit basis, for the benefit of its members. Membership agreements were prepared and signed by farmers over the United States which authorized NFO to act as their exclusive agent in collective bargaining. They authorized NFO to sign master contracts with processors for the sale of their commodities and to activate them when 60% of the previous three years' production, either nation-wide or over a sufficient portion of the market so that this percentage is the controlling factor in the market, had been placed under these contracts.

Until master contracts are activated, NFO receives a minimum of $25.00 a year from each member for membership dues. After master contracts are activated, NFO will then receive 1% from each member's gross sales to defray the expenses of running the organization in place of the $25.00 annual dues, plus an additional 2% of each member's gross sales to be used for surplus disposal, at the discretion of the directors.

Under these same contracts, NFO also agrees to act as a procurement agent for the purpose of furnishing these same processors with the various commodities covered thereunder. For acting as said procurement agent for these processors and for performing other services under said contracts, the processors agree to pay direct to NFO from their own funds an amount equal to 5% of the gross sales of the commodity covered under the contract received from NFO members. One-half of 1% of said 5% received from the processors is to be used, as determined

by NFO's national board of directors, to promote the sale of the particular product called for under these contracts, and the disposition of the balance of said 5% is to be determined at a special national convention of the members of NFO, to be held prior to the ratification of the first master contract. [R. pp. 5-21, and attached exhibits] None have been activated to date. Management has led the entire membership to believe they can get this 4.5% because NFO is built on a profit structure under the principle of a free enterprise system. As a result, this 4.5% will always guarantee NFO members a greater profit over non-members for the sale of their production. [R. p. 94, and attached Exhibit Z] They have been told that the processors could not legally pay this 4.5% direct to NFO's members—it had to be paid first to NFO, and then NFO could legally distribute this money to its members. [R. pp. 72-92 (Affidavit of Philip F. Apple, Exhibit P, pp. 159-161)]

In August of 1964, I was employed on an hourly rate, on a case-by-case basis, to defend NFO and its members in many injunction and damage suits that grew out of a meat holding action. This involved about 95% of my efforts. Counsel concedes this activity was not substantially related to the subject matter herein. [p. 30 of Respondent's Brief in Appellate Court] An analysis of the rest of the pertinent parts of the record proves all my other activities were not substantially related to this action either.

I began to suspect there were very serious problems in NFO's structure. However, I had no idea the officials of NFO already knew this but were deliberately withholding vital information from the membership and were keeping it secret. Thinking I was doing our farmers and the general public a great service, I voluntarily on my own

initiative, and without a request, promise of pay, or knowledge of NFO's officials, researched and uncovered all matters made the subject of this action from public documents. Several months later, I was still trying to get management to let me meet with the directors to inform them of what I had uncovered, but all I ever got was promises. Finally, the president and executive committee admitted to me in September of 1965 that they already knew about these problems. They felt this information was secret and confidential and the members did not have a right to know about it. They criticized me severely for uncovering them because they had not employed me to do so. After objecting to paying an additional $1,000.00 I submitted with other fee statements for part of my research time and 173 pages of research material I was giving them, because they did not want to pay to educate me, too, I agreed to deduct the $1,000.00. This was about 1:30 a.m. By this time, however, the office personnel to whom I had given my statements several hours earlier for processing, had gone home. When I returned to NFO headquarters at 8:30 a.m. the same day, they had changed their mind before I had an opportunity to get my statement and deduct the $1,000.00. Therefore, the original amount was paid.

Once aware I was not going to be able to inform the directors of the gigantic fraud that was being perpetrated upon the entire membership and I was convinced the officials were not going to do anything about it, I wanted no part of it. Therefore, I resigned on November 10, 1965. [R. p. 93 (90-91)] My renewed request on November 22, 1965, (R. p. 93 (93)] to meet with the board, free of charge, was again refused by NFO's president on November 24, 1965, [R. p. 93 (94)] who demanded that

I not communicate or contact them, their officers, directors, or members.

On November 19, 1965, I spent about four hours in my office explaining my findings and giving citations to Mr. Lee Sinclair, NFO's chief counsel, who had resigned from the trial staff of the Federal Trade Commission in October, 1965, to represent NFO. Thereafter, Mr. Sinclair told the plaintiff, Keith Dare, and other members at NFO's national convention around December 3, 1965, he agreed with me that these problems existed, and I was right. However, they should not concern themselves any further with these problems; just leave them alone because they would all be corrected within a six months' period of time. He promised to so notify Mr. Dare, but he never did. [R. p. 140 (8-9)] Some of NFO's officials from the national office were also in Indianapolis on November 19, 1965. They admitted to Mr. Dare and other members they had already known about these problems and that I had been trying to meet with the board for a long time, but the president, being the boss, did not think it necessary. They had traveled from Corning, Iowa, at the request of President Staley to try to persuade Mr. Dare and other members to sign affidavits and cooperate with Mr. Staley to bring disbarment proceedings against me for telling Mr. Dare about matters set out in this suit. [R. pp. 72-92 (Affidavit of Keith Dare, Exhibit E, pp. 93-95)]

Later on, the officials held membership meetings for the purpose of telling members everything was alright; that there was nothing to worry about; just leave everything to them. [R. p. (9-10)] On December 29, 1965, Mr. Sinclair wrote me, saying he had advised the officials of NFO the 5% provision in the master contracts did not

violate Section 2(c) of the Robinson-Patman Act and on this one point we did not need to concern ourselves further. [R. p. 93 (139)] While he was a member of the Federal Trade Commission, it issued certain cease and desist orders against certain members of the Fresh Fruits and Vegetables Industry for charging and receiving compensation from the opposite side of the same sales transaction for services rendered. Also, after a four-year study of the entire problem and a public hearing on the proposed rules in Washington, D.C., before the full Commission on October 1, 1964, [R. p. 141], the Federal Trade Commission promulgated certain trade practice rules in April, 1965, to advise them this could not be done because the "services rendered" provision was not an exception to the prohibition set forth in Section 2(c) of the Robinson-Patman Act.

Over the months that followed my resignation, many NFO members continued to inquire about my findings. Some members wrote letters. [R. p. 93 (165-167)] As an attorney, I was caught. If I spoke up, I knew NFO officials would attempt more disbarment proceedings to keep me quiet. If I remained silent, I would be concealing this fraud. If I said anything and it was short of the facts, it would be wilful misrepresentation. I knew that NFO was bound to fail under the present arrangement, regardless of how one argued. Therefore, I asked the Indiana State Bar Association for guidance because the members suspected there were problems and wanted me to file an action for declaratory judgment for and on behalf of NFO, since it could not do so and the officials refused. [R. p. 93 (160-164)] After conferring with the Indianapolis Bar Association, I was advised it would be ethical for me to inform the membership of these problems made the subject of this action and to represent them herein. [R.

p. 72 (167-168)] Otherwise, its counsel thought I would be concealing what I believed to be a fraud upon the organization. [R. p. 93 (176)] Thereupon, I made said disclosures, and several hundred members from several states asked me to prepare and file this suit for them, through the plaintiffs as their representatives. They were only interested in seeing that NFO was made to operate within the law and to correct the fraud being perpetrated upon the membership.

Thereafter, I prepared and filed the pending action as attorney for the plaintiffs. [R. pp. 5-21] All three paragraphs of the amended complaint are proceedings for declaratory relief under Rule 56 of the Federal Rules of Civil Procedure and under 15 U.S.C., §§9 and 22. Paragraph I is to determine the validity of said master contracts and membership agreement, when viewed in terms of the Clayton Act, §2, amended by the Robinson-Patman Act, §2(c), 15 U.S.C., §13(c). Paragraph II is to determine the validity of said master contracts and membership agreement, when viewed in terms of Chapter 504 of the Iowa Code, as to whether NFO, in its present status and for its intended purposes, is qualified to act as a bargaining agent for its members under the immunities of the Clayton Act, §6, 15 U.S.C., §14, as amended by the Capper-Volstead Act, §1, 7 U.S.C., §291. Paragraph III is to determine the validity of said master contracts and membership agreement, when viewed in terms of said Chapter 504, as to whether the immunities of the Clayton Act, §6, 15 U.S.C., §14, as amended by the Capper-Volstead Act, §1, 7 U.S.C., §291, exempts NFO from violating Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C., §§1 and 2, and for other incidental relief.

Counsel for NFO answered the plaintiffs' amended complaint [R. pp. 22-42] and filed a petition to disqualify me as plaintiffs' counsel. [R. pp. 65-71] The grounds relied upon in the petition and the attached affidavit of NFO's president [R. pp. 68-71] were to the effect that knowledge of the material and relevant portions of the public documents made the subject of this suit were secret and confidential and should not have been disclosed by me to NFO's membership, and management had not consented thereto. Plaintiffs' reply to NFO's answer was filed, [R. pp. 43-64] an answer to defendant's motion to disqualify, [R. pp. 72-92) and special pleadings (R. pp. 98-108] thereto were filed, among other papers.

Many, many affidavits in the record from members from various states show they joined NFO, paid their dues, and gave of their time, efforts, and resources to make NFO work in the belief they would get the 4.5%. [R. p. 72 (Exhibit O, pp. 112-158)] None of them knew of these prohibitions. They feel they have been taken advantage of by not being told everything and that the fraud, illegality, and other wrongdoing appearing on the face of the record creates an exception to any attorney-client privilege, if one exists, which would not only require or permit me to inform them of these problems, but to represent them, as trustees herein, for and on behalf of NFO to correct these same problems.

On March 31, 1967, the District Court, nevertheless, ordered my disqualification. [R. pp. 126-127] The Court of Appeals affirmed on Wednesday, May 31, 1967, [Appendix I] and on June 26, 1967, denied a petition for rehearing. [Appendix II]

ARGUMENT

This part concerns the first question.

On page 30 of respondent's brief before the Court of Appeals, it is conceded that the subject matter of the various injunction suits are not substantially related to the pending action. Let us analyze documents in the record on my remaining efforts, which prove they are also unrelated. See, *McMullen* vs. *Hoffman,* 174 U.S. 639, 19 S. Ct. 835, 43 L. Ed. 1117 (1899).

(1) *With reference to the matter in Akron, Ohio.* A comparison of what was prepared and in existence at that time with what was prepared after this suit was filed in Exhibit D-1 [R. p. 97] proves that case involved another *injunction* suit. Exhibit A-1 [R. p. 97] proves Mr. Herman was also mistaken in his affidavit [R. p. 93 (105)] as to what I had agreed to send Mr. Rabe, the attorney; which was Exhibit B-1. [R. p. 97] This is no authority for anything, and as I indicated to Mr. Rabe, it was the best I had on the question he asked me that night in Akron. Being an attorney, he well knew this. Had I gone over there for that purpose, or anything other than to give my viewpoints and my authorities on how I got injunctions dissolved, does it not stand to reason I would have gone prepared with the best I had?

(2) *With regard to the Benson Cooperative Creamery Litigation.* The affidavit of attorney, Richard Hilleren, [R. p. 72 (182-183)] shows it was the violence and other illegal activities which caused him to threaten and almost join NFO as a party defendant in that suit. It reveals that after he and I had a series of meetings in Benson,

NFO was not joined. This is in absolute harmony with and supported by President Staley's letter to me dated September 11, 1965, [R. p. 93 (84)] and my reply thereto dated September 13, 1965. [R. p. 93 (85)]. They show NFO was not legally involved or *affected,* and my job was to keep NFO from becoming involved in those two cases. This is exactly what I did for NFO. Had there been a substantial relationship, copies of the pleadings and brief I sent President Staley and Mr. Rust in my courtesy letter dated July 23, 1965, [R. p. 93 (78-79)] would have been filed as proof.

It is asserted my courtesy letter of May 23, 1966, [R. p. 93 (95)] amounts to an unequivocal admission of being previously employed to represent NFO's best interests in connection with the same master contracts which this suit is attacking. Every time I defended NFO in the injunction suits, I represented NFO's best interests in connection with those contracts, because the holding actions were instigated to force processors to place enough production under contract to activate them. The defendant admits the validity of these contracts were not involved. President Staley's *own letter* proves the same to be true in the *Benson* case.

(3) *With respect to the affidavit of Fred Deardorff, a director.* [R. p. 93 (114-115)] It proves I was trying to disclose my findings on the subject matter of this suit to them at least *before* August 9, 1965. He reveals they were unaware of those problems. They were either persuaded not to listen to me or they did not think enough of what I had to say to listen. Instead, they decided to learn of these highly complicated matters in a second-handed fashion, and then from farmers who were not lawyers or versed in the law. Furthermore, the persons who were

to get the details from me and make the report were the very same ones who already knew about these problems, and who, according to President Staley's affidavit, felt such matters were secret and confidential and should have been withheld from the members. Even though I admit being NFO's general counsel in charge of the injunction suits, his affidavit proves the directors neither considered me as NFO's general counsel in charge of *all* its legal affairs, nor did they employ me to research and uncover these matters for them.

(4) *With regard to President Staleys letter dated August 21, 1965.* [R. p. 93 (81-82)] It should be viewed in connection with Mr. Deardorff's affidavit. It was written about ten days after the same directors' meeting referred to in Mr. Deardorff's affidavit. Speaking only of the grain memo, Mr. Staley said:

> "You will not need to be concerned with *this* matter any further.
>
> "You may, however, proceed *as you have been* on the remaining cases arising from the holding action." (emphasis supplied)

Mr. Staley's letter was totally void of even a remote reference to those matters discussed at the board meeting only ten days previously, about which I had been trying to meet with them. Since Mr. Deardorff's affidavit shows the directors decided to refer matters to Mr. Sinclair, if either Mr. Staley or the officers *had* employed me to dig into these matters, it is certain Mr. Staley would have included my activities concerning the subject matter of this suit as part of those things I was instructed not to be concerned with further when he limited my activities to proceed only as I had been on the remaining cases arising from the holding action. He has proven that matters em-

braced within the pending suit are not closely related to any area in which I was *employed* by either him or the officers to represent NFO.

If any question still remains, his letter to me dated November 19, 1965, [R. p. 93 (92)] removes even the last doubt, when he said:

> ". . . We accept your termination of services as *an attorney* for the NFO . . .
>
> "I sincerely regret that you found it necessary to terminate your employment because I do feel you could still be of *some value* to the organization in *some matters* on which you have had experience." (emphasis supplied)

He has proven I was only considered as *an* attorney for NFO and to be of value to NFO only in the injunction suits.

(5) *With regard to my resignation letter.* [R. p. 93 (90-91)] It is asserted my resignation letter shows it was through specific employment on the grain memo which led me to researching the subject matter of this suit. I will concede to an inaccurate use of words, but under the circumstances, I was not prone to dwell in great detail on the strict order of all the many, many events in my resignation letter. There was no reason to. The very first sentence, however, actually shows the limits of my extra employment, and other documents in the record prove this to be the case. First, it is completely consistent with President Staley's letter of August 21, 1965. Second, Herb Goodman's affidavit, [R. p. 93 (98-101)] shows it was during the second week of April, at least, that a copy was delivered to me. Third, Mr. Staley's letter of August 21, 1965, shows I had finished and made my report on that memorandum by June 5, 1965. It would

have been physically impossible for me to have continued with all of the remaining injunction suits arising out of the holding action, covering the distances involved, plus maintaining the rest of my law practice, plus getting into the tax matters in the grain memo, and after this was done to have also researched all the questions involved in the pending suit, selected only those portions I decided were relevant, reduced them to writing and accumulated 173 pages of research material if I had not started until *after* I got *into* the grain memo. Everyone of us knows there would not have been sufficient time. I had to start my research on the subject matter of this suit long before that time, which I did, as I alleged in rhetorical paragraph 14 of my answer, during the last week of February, 1965. Having overlooked this crucial time factor, a different argument was made which involved Mr. Herb Goodman's letter to me dated June 29, 1965. [R. p. 93 (77)]

(6) *With regard to Mr. Goodman's letter dated June 29, 1965.* Counsel for NFO asserted next that Mr. Goodman's letter shows I was employed to render a legal opinion as to the legality of NFO's master contracts; that it was not until I had examined a copy of the opinion Mr. Goodman forwarded to me from a law firm in Saginaw, Michigan, as to their illegality that I became aware of these problems and started researching the questions involved herein; *that this resulted in a substantial relationship to an area of previous employment,* even though Mr. Goodman admits NFO never received such an opinion from me. *This is almost the same language in* the *Appellate Court's opinion* and appears to be the area of my previous representation found to be substantially related.

That letter could not have been sent in good faith. They knew I had been trying to reach the directors, and they knew I was not going to make it. They sent that letter to eliminate me as a potential threat from disclosing all of these facts I had uncovered to NFO's membership, and there are several items in the record to prove it. First, this crucial time element was overlooked again. I did not receive Mr. Goodman's letter until the first of July, 1965. Mr. Deardorff's affidavit proves I had been trying to meet with the directors on these problems at least *before* their meeting of August 9, 1965. Consequently, I would have had even *less* time to do everything under this argument. Second, if they were really sincere in wanting an opinion, why did they wait one and one-half years after that opinion had been written and circulated and almost six years after the master contracts had been written and signed by various processors before seeking one? Why did President Staley refuse to grant the requests of Alfred Morris and the plaintiff, Roland Waters, both of whom were helping write the master contract for milk, when Mr. Morris wanted to seek the advice of an attorney in its formulation? [R. p. 140 (32-33; 14-18)]

Third, if they really were sincere in wanting a legal opinion, *why did they ask me, of all people?* Mr. Staley's letter makes it clear this was not an area in which they thought I could be of any value to NFO. Mr. Deardorff's affidavit makes it crystal clear this was not an area in which the board would even take their time to listen to me, let alone employing me to get into. The affidavit of the plaintiff, Keith Dare, [R. p. 72 (93-95)] reveals this was not only the same feeling of Harvey Sickels, a director and national secretary of NFO, and of Glen Utley, NFO's senior board member, but it was also the same attitude of *Herb Goodman himself* Furthermore, Mr.

Goodman voluntarily told Mr. Dare that I *had been trying for a long time to meet with the directors to explain the problems to them and make them aware of them,* but Mr. Staley said it was not necessary for me to meet with the board, because the directors were not the boss; that Staley was running the organization and he was the boss. Mr. Goodman also filed his counter-affidavit, referred to above, in which he tried to explain or deny certain charges. It is *extremely important* to observe he refused to deny or explain these remarks attributed to him by Mr. Dare when he surely had a duty to do so, if they were not true.

Since the affidavits of the members [R. p. 72 (112-158)] show the membership was wholly unaware of these problems, *I had to do it on my own.* Even though I did so and admit it, this fact neither justifies my disqualification as plaintiffs' counsel in the pending case, nor does it support the Court of Appeals' finding that the subject matter of this case is substantially related to the subject matter of my previous representation of NFO that would warrant sustaining the District Court's order, which erroneously disqualified me as plaintiffs' counsel herein.

This part concerns the second question.

Even though the Court of Appeals' finding was correct that the pending suit is substantially related to my previous representation of NFO, in so doing that Court erred in holding that the rationale of the three cases it relied upon supported its order which affirmed the District Court's order that disqualified me as plaintiffs' counsel.

First, let us assume master contracts were already activated and this were a suit where I represented a processor against NFO and its members for violation of the anti-

trust laws and for treble damages under the controlling principles set out in *Allgair* vs. *Glenmore Distilleries Co.*, (N.Y.), 91 F.S. 93 (1950). If this were the case, then I can see where the rationale of these three cases might apply. However, a comparison of these three cases with our instant situation shows that the kind of organizations involved, the facts, the purposes back of the rules and the applicable law are all distinguishable.

In the case of *T. C. & Theatre Corp.* vs. *Warner Bros. Pictures,* 113 F.S. 265 (1953), Cooke filed the action on behalf of the plaintiff against Universal for treble damages for violation of the anti-trust laws. He based the suit against Universal upon a government anti-trust conspiracy suit in which Cooke had represented Universal on appeal. (The pending case is an action by the members of NFO, who are acting as trustees on its behalf, for corrective declaratory relief because the officials refuse to do so.) They are acting precisely as a guardian ad litem goes into court to obtain like redress for a client under disability because of incompetency or nonage. See, *Whitten* vs. *Dabney,* 171 Cal. 621, 154 P. 312 (1915).

The court said that as the present counsel for the plaintiff, Cooke would necessarily be called upon to prove against Universal, his former clients, *the very charges* against which he had earlier defended it. (Counsel admits that the injunction and damage suits in which I defended NFO are not even substantially related to the subject matter of the pending case.)

During the preparation of the findings on appeal, in which Cooke represented Universal, he was in full command of all of Universal's legal affairs. He received very much confidential information concerning the innermost workings of Universal in defending them. He was looked

upon for leadership generally and specially, and he was consulted with as to *all* aspects of Universal's activities. (The proven facts show NFO's directors would not take their time to hear what I had to say, and the persident did not feel this was an area in which I could be of any value to NFO. Also, matters made the subject of this action involve only public documents. Furthermore, I was not on a retainer basis or permitted to advise or consult the directors or even sit in on their board meetings.) [R. pp. 72-92 (Affidavit of Roland Waters, Exhibit D, pp. 87-92])

The co-defendants in the above cited action were also co-defendants in the government's, conspiracy action. They, likewise, asked for a disqualification of Cooke from prosecuting the action by the plaintiff against them. The court, however, ruled that the conferences on appeal did not involve a disclosure of anything that was *confidential.* Furthermore, the court ruled that since Cooke took a position that was adverse to a number of said co-defendants on appeal, his present position in representing the present plaintiff against them for the same kind of an action was not *inconsistent* with his previous position against them on appeal. (My letter of December 20, 1965, to Mr. Sinclair, [R. p. 93 (118-138)] shows that my present position with regard to the subject matter of this suit is not inconsistent with my previous position.)

Even though it applies to the next question, this case also recognizes there is an exception to the general attorney-client privilege. The court said at page 268 as follows:

> "He is enjoined for all time, *except as he may be released by law.*" (emphasis supplied)

The case of *Consolidated Theatres* vs. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920 (1954), involved another *private* action for treble damages for violation of the anti-trust laws. Nickerson filed this action on behalf of the plaintiff against a large number of motion picture producers, which included Twentieth Century Fox Film Corporation. He based the suit upon the same government anti-trust conspiracy suit as was done by Cooke in the *T. C. Theatre Corp.* case.

Nickerson was employed as an attorney in a law firm, during which time he participated in three motion picture anti-trust suits. He admitted that in each of these cases he had *complete access* to all the records and files of the various companies involved. He arranged the files for presentation to the court. He attended the trial and took notes of the testimony and the general proceedings of the trial. He interviewed employees and managers, who were instructed to give him their fullest cooperation in obtaining all the facts that they wanted. This included details of the innermost workings of these corporations. He analyzed, digested, and organized files containing documentary evidence. He was present at interviews. He helped prepare witnesses to give testimony at the various trials, and helped obtain data on the facts in preparing cases for trial. (I was at national headquarters only a very few times. At no time did I have complete access to anything. Instead of getting the fullest cooperation, I got just the opposite in trying to meet with the board on these matters.)

One of these suits involved a defense of Twentieth Century Fox Film Corporation, one of the principal clients of the law firm where Nickerson was employed. That

same company was a defendant in the case that he was filing on behalf of the plaintiff. Accordingly, a motion for his disqualification was filed.

There was some concern over whether or not he was considered as a law clerk, general counsel, special counsel, or an associate, and what effect, if any, this would have. The court said at page 927 as follows:

> "We do not think that titles have much to do with the real problem here. Canon 6 is devised to protect the *secrets* and *confidences* reposed in the attorney by his client. It is the work done for the client and the access to the confidential information of the client which is crucial in determining whether the obligation of Canon 6 arises." (emphasis supplied)

(No secrets or confidences were reposed in me by NFO concerning the subject matter of this case. Instead, I was prohibited from letting the directors know what I had uncovered on my own initiative and only from public documents. In fact, I was severely criticized in doing so.)

The court held that Nickerson's representation in the former cases involved the *same kind* of law suit wherein he obtained all of the *secret* and *confidential material* which he was now attempting to use against his former client *in order to collect* **damages**. (Again compare the facts of this case with the relevant portions of our instant situation.)

The case of *Cord* vs. *Smith*, 338 F. 2d 516 (1964), is distinguishable on several important grounds, one of which I will refer to in the next question.

In 1934, Young, an attorney, brought an action against Cord for $250,000. attorney fees wherein he alleged, under oath, that he had acted as Cord's attorney in connec-

tion with a matter involving the Los Angeles Broadcasting Company.

Prior to this time, however, while Young was representing Cord, he had prepared a contract for Cord around 1932 wherein Cord agreed to divide equally the profits upon the sale of certain radio stations with Mr. Smith, the manager. When the stations were sold in 1962, Cord refused to honor the contract. Whereupon Smith employed Young to bring an action for *three million dollars damages* against Cord for a breach of that contract. During the course of the proceedings, Cord's attorney discovered that Young had prepared the contract for Cord when he was representing him years prior to that time. (Compare this with the fact I had nothing to do with preparing any of NFO's contracts.) He promptly filed a motion to disqualify Young as Smith's attorney.

In sustaining this motion, the court said at page 523 as follows:

> "The canons that require that a lawyer who has represented a client in a transaction, may not thereafter represent the *other party to the transaction,* in an action against his client *based upon the transaction,* are not to be so readily avoided." (emphasis supplied)

How can the rationale of that rule possibly apply to our instant case?

On July 22, 1967, President Staley prepared and over his own signature circulated to NFO's entire membership, a four page, single-spaced document in which he said, among other things:

> "It's going to take the *support* of the members *because NFO is the members.*"

I agree with President Staley. When I represented NFO, I was representing the members' best interests. They were the ones that paid my attorney fees. I never represented NFO against its members on any subject matter. How can it be rationalized that by representing those same members in an action for declaratory relief in the capacities as trustees for the benefit of their own organization that they are occupying the position of the "other party" to the transaction within the meaning, spirit, and purpose of the rules set forth in *Cord* vs. *Smith,* supra?

It is respectfully submitted that the controlling *principle* of law in the case of *Jacuzzi* vs. *Jacuzzi Brothers, Incorporated,* 218 App. Div. 24, 32 Cal. Rptr. 188 (1963), is squarely on point and the rule to be applied herein. That suit involved an appeal from an order denying the appellant's motion to disqualify two attorneys who formerly represented the corporation. In fact, Mr. Gray, one of the former attorneys, had represented the corporation for over *twenty-five years,* and during a portion of that time he served as *chairman of the board of directors.* After he resigned, however, he had no further connection with the corporation. (After I resigned, I had no further connection with NFO.)

That action was filed by Mr. Gray as a stockholders' derivative suit. It was brought for and on behalf of the corporation by these stockholders for the purpose of restoring to the corporation property and assets alleged to have been improperly transferred for an inadequate consideration.

The appellant's principal contention on appeal was that Gray had previously represented the corporation. Consequently, this prevented him from representing the minori-

ty stockholders in that action. It was held on appeal that the action was really brought for *the benefit* of the corporation, who was Gray's former employer. Therefore, the action was not really *adverse* to the corporation; to the contrary, it was brought for and on behalf of the corporation itself. (This rule would apply with added force to a not-for-profit agricultural corporation.)

The stockholders for whom Gray was then acting as attorney were really, in effect, guardians ad litem and trustees for the benefit of the corporation. At page 192 of the 32 Cal. Rptr. the court concluded by saying:

> "Since Gray acts for the benefit of the corporation he previously represented it is apparent he is not representing an interest adverse to the corporation, and the prohibition of Rule 5, Rules of Professional Conduct, *can have no application.*" (emphasis supplied)

This part concerns the third question.

Even though it is deemed that a substantial relationship exists to my previous representation, and even though this finding is deemed to be supported by the rationale of the cases relied upon by the Court of Appeals, it still committed error in holding that this was dispositive of the controlling issue when all of the record and the law appertaining thereto are considered. See, *McMullen* vs. *Hoffman,* supra. Wrongdoing, fraud, misrepresentation, proven concealment of material facts and information from the members, and other illegality appear, even on the very face of the record. It has been contended from the beginning this creates an exception to any attorney-client privilege, if one existed otherwise.

The following hypothetical is submitted to point up the question herein. Assume I was joined as a party de-

fendant in an action against NFO's officials for failure to make the disclosures required by law because I knew of these problems but remained silent, too. Would my defense of the attorney-client privilege be sustained, or would I suffer the same or worse fate than the five year prison term a young attorney by the name of Hett received in *Hett* vs. *United States,* 353 F. 2d 761, Certiorari denied 384 U.S. 905 (1966), because he knew of his client's plans and intentions to commit a crime but did not report this to the proper authorities? The case of *United States* vs. *Hoffa,* 349 F. 2d 20 (1965), even though on a different subject matter, provides the answer to this question at page 37, where the following rule appears:

> "the attorney-client relationship would offer no shield to either client or attorney if the client had been engaged in a plan to commit a crime in the future."

As between the two social policies competing for supremacy, the court in cf., *State* vs. *Kirkpatrick,* 220 Iowa 974, 263 N.W. 52, 55 (1935), laid down this rule:

> "It is a mistaken notion to think that an attorney has the right to assist in the perpetration of a fraud, and a mistaken notion that one having in mind the perpetration of a fraud or a crime can safely entrust this knowledge to an attorney any more than to anybody else."

In *People* vs. *Warden of County Jail,* 150 Misc. 714, 270 N.Y.S. 362 (1934), the court said at page 371:

> "A client who consults an attorney for assistance in connection with a contemplated violation of law can expect no help from the law. He cannot complain if the truth is allowed to be told. A mere charge of wrongdoing will not suffice. There must be *'something to give colour to the charge'."* (emphasis supplied)

The court said this conclusion was inevitable, if we are to maintain the *honor of the profession,* and make an officer of the court an agency to advance the ends of justice, rather than to be used as an instrument to subvert them.

The following rule appears in the case of *People* vs. *VanAlstine,* 57 Mich. 69, 23 N.W. 594, 598 (1885), concerning attorney-client privileges:

> "But there are exceptions to the general rule, based upon public policy and public security. Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become *the duty* of the attorney to do so." (emphasis supplied)

In *Gebhardt* vs. *United Rys. Co. of St. Louis,* (Mo. Sup.), 220 S.W. 677 (1920), an attorney went forward voluntarily and was permitted to testify against his former client in order to prevent the consummation of a contemplated fraud. At page 679 the court further stated:

> "The testimony of the witness Grant Gillespie was therefore also admissible, *even if he had been plaintiff's attorney,* which he was not." (emphasis supplied)

Henry S. Drinker in his book on legal ethics at page 137 says:

> "A lawyer representing a corporation may and should disclose to its directors or members defalcations by the managers which the lawyer learned about in connection with his representation of the corporation."

The affidavit of Fred Deardorff shows this is what I tried to do.

Canons 16, 32, and 41 of the Canons of Professional Ethics, as amended, ABA, are especially applicable. The record shows I tried to comply with all three of them. In fact, I tried for months to meet with the board of directors, I provided NFO's officials 173 pages of research material, I wrote counsel a 21 page written opinion, and spent four hours with him so appropriate steps might be taken.

In July of 1961, Mr. James A. Gardner, a member of the California Bar (Fresno), published an excellent article entitled, *"The Crime or Fraud Exception to the Attorney-Client Privilege"*, in 47 ABA 708. Even though he is quick to recognize the attorney-client privilege and the reasons for it, he also points out that this is only one of the components which go to make up this more inclusive whole. He states that the crime or tort exception represents a healthy counter-balance to the attorney-client privileges which can serve, *even more than it has in the past,* to protect the honor of the profession and to frustrate not only the person who would use the law to achieve a particular unlawful objective but also the professional crook when acting in his capacity as such.

With regard to the question of fraud, the court in *Pittman* vs. *Lageschulte,* 45 Ill. App. 2d 207, 195 N.E. 2d 394, 399-400 (1964), defined it as follows:

> "Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the supression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture. . . . If fraud be proved, it vidiates all transactions touched by it."

See also, *Gibbons* vs. *Brandt,* 170 F. 2d 385, Certiorari denied 336 U.S. 910, rehearing denied 336 U.S. 929 (1948); *Isaacs* vs. *United States,* 301 F. 2d 706 (1962).

Fraud can be classified as *actual fraud,* which amounts to deception intentionally practiced inducing another to part with property or some legal right; or *constructive fraud,* amounting to a breach of a legal or equitable duty which arose irrespective of moral guilt, and is fradulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests; or *implied fraud,* consisting of representations implied from conduct as distinguished from statements actually made. *Stern* vs. *National City Co.,* 25 F.S. 948, affirmed *City Co. of New York* vs. *Stern,* 110 F. 2d 601, reversed 312 U.S. 666, mandate conformed to 142 F. 2d 449 (1939).

Constructive fraud usually arises where a fiduciary or confidential relationship exists. In such instances it is unnecessary to prove deliberate or intentional fraud. *Cumberland Portland Cement Co.* vs. *R.F.C.,* 140 F.S. 739, affirmed 232 F. 2d 930 (1956). See also, *Lawton* vs. *Strong,* 87 Ariz. 17, 249 F.2d 299 (1957).

Furthermore, cupable ignorance furnishes no immunity for false representations or concealment. *Anderson* vs. *Tway,* 143 F. 2d 95, Certiorari denied, 324 U.S. 861 (1945).

There is always an affirmative duty of the utmost good faith to disclose all material facts, and a failure to do so constitutes fraud. *Allen Realty Co.* vs. *Uhler,* (Ind.), 146 N.E. 766 (1925); *Gidney* vs. *Chapple,* (Okla.), 110 P. 1099 (1910). See also, 37 C.J.S., Fraud, §16, p. 248, notes 24 and 25.

A fiduciary has an affirmative obligation to employ reasonable care to avoid misleading those who depend

upon him for guidance. See, *Securities & Exchange Commission* vs. *Capital Gains Research Bureau, Inc.*, (N.Y.), 375 U.S. 180 (1963). This is especially true where one has superior knowledge or knowledge which is not usually within the fair and reasonable reach of the other party. When a person remains silent with regard to an important matter which he knows the person relying upon him is depending upon, believing he is getting the true state of facts in which to enable him to judge the expediency of his bargain for himself, and the fiduciary has not made a full and complete disclosure, or there has been only a partial disclosure, which misleads and conveys false impressions and such half-truths or nondisclosure constitutes a concealment of all the facts, then the cases uniformly have held this constitutes fraud whether it be actual, constructive, or implied. *Berger* vs. *Amana Society,* (Iowa), 111 N.W. 2d 753 (1962). See also, *Equitable Life Insurance Co. of Iowa* vs. *Halsey, Stuart & Co.,* 312 U.S. 410 (1941); *Strand* vs. *Librascope, Inc.,* 197 F.S. 743 (1961); *Consolidated Oil & Gas, Inc. vs. Ryan,* 250 F.S. 600 (1966); *Nichaolds* vs. *McGlothlin,* 330 F. 2d 454 (1964); *United States* vs. *Certain Property, etc.,* (N.Y.), 306 F. 2d 439 (1962); *Texas Tunneling Co.* vs. *City of Chattanooga, Tenn.,* 204 F.S. 821, affirmed in part, revs'd in part, 329 F. 2d 402 (1962); *Lawson* vs. *Haynes,* 170 F. 2d 741 (1948); *Fernandina Shipbuilding & Dry Dock Co.* vs. *Peters,* (Fla.), 283 F. 621 (1922); *Murillo* vs. *Hernandez,* 79 Ariz. 1, 281 P. 2d 786 (1955); *Callahan* vs. *Wolfe,* (Idaho), 400 P. 2d 938 (1965); *Reeder* vs. *Guaranteed Foods, Inc.,* (Kan.), 399 P. 2d 822 (1965).

The case of *Berger* vs. *Amana Society,* supra, was a stockholders' derivative action to nullify an amendment to the articles of incorporation, based on the violation of

contract rights, fraud, misrepresentation, and deceit of the stockholders by the officers of the Amana Society. The lower court dismissed the action. However, on appeal it was held the officers had taken advantage of the faith and confidence that had been placed in them by the great majority of class A stockholders so as to procure the adoption of an amendment to the articles of incorporation destroying certain rights and which required certain shares of stock to be redeemed for cash. The appellate court said this went to the very vitals of the Society.

The court found that at stockholders' meetings there was an attempt to explain the nature of the proposed amendment. In fact, a prepared statement had been circulated, but in each of these instances there was wholly lacking any information on the vital question of the future control of the Society and what effect the amendment would have upon 300,000 shares of class B stock. The court found there had not been a full and complete disclosure to them of the full impact of what the amendment would do or was designed to do. The appellate court ruled that once the officers undertook such a duty to explain the nature of what the amendment proposed to do, it was incumbent upon them to do this wholly, specifically, and completely. The court said it could not help but recognize the fact that many members of the Society had no more than an eighth grade education, and therefore they depended upon their leaders for proper guidance. However, they did have the intellect and intelligence to vote independently on matters if they were properly explained to them. The court ruled this constituted a case of fraud that had been perpetrated upon the membership because equity and good conscience demanded that when the matter was attempted to be explained to them, particularly when it went to the vitals of

the organization, that a full, fair, and complete disclosure had to be made. Consequently, the lower court erred in holding there had been no fraud or deceit perpetrated upon the membership, even though there was no evidence in the record that the acts of the officers were done intentionally. The case was reversed, and full attorney fees were awarded for the plaintiffs' attorney, because this was an action that was brought for and on behalf of the corporation itself and not just the plaintiffs as certain individuals.

The president's affidavit attached to the motion as grounds for my disqualification is positive proof [R. pp. 68-71] that the official position of management is and has been intentionally opposed to and in direct violation of the fiduciary responsibilities imposed upon them by law, which demands that a full, complete, and fair disclosure of all the material facts and applicable law concerning NFO must be made to its membership. This in and of itself constitutes fraud and deception as a matter of law, *without any consideration of the merits.*

The membership had every right to be informed of the language appearing in Section 504.10 of the Iowa Code and in Articles IX and XI of NFO's Articles of Incorporation.

They had every right to know about the interpretations placed on this section by the highest court in Iowa in making up their own minds as to the benefit of their bargain in joining NFO. See, *State* vs. *Amana Society*, 132 Iowa 304, 109 N.W. 894, 895 (1906). In construing the meaning of that statute, the court said:

> ". . . By the third section, [referring to Section 1645 and now 504.10] distribution of the property, by

dividend or otherwise, prior to dissolution, is not allowed."

The court went on to make a distinction between corporations organized under that law and those for pecuniary profit when it said:

> "The distinction between corporations organized under this chapter and those for pecuniary profit has relation, not to whether one or the other shall earn or receive an income, though this may be important as evidence, but to the design had in organizing and objects sought to be obtained; not to methods pursued so much as the things to be accomplished. *If the purpose is to earn money or property, if financial gain is the main or controlling object for which the corporation is created then, regardless of other circumstances, it is within the class designated as corporations for pecuniary profit.*" (emphasis supplied)

See also, *People* vs. *Universal Service Ass'n*, 365 Ill. 542, 7 N.E. 2d 310 (1937), where a similar statute was involved. In ousting the defendant as a non-profit corporation, the court said at page 312 that:

> "The scheme, when reduced to its essentials, is a business arrangement designed to produce a profit."

In *State* vs. *Hutterische Bruder Gemeinde*, 46 S.D. 189, 191 N.W. 635 (1922), the court vacated the articles of incorporation, and it was *dissolved as a non-profit corporation* because the principal business of the corporation was farming for purposes of sustaining its colonies.

The case of *Read* vs. *Tidewater Coal Exchange*, 13 Del. Ch. 195, 116 A. 898, 904 (1922), sheds further light upon this particular subject, when it said:

> ". . . A corporation is for profit when its purpose is, whether dividends are intended to be declared or not, to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends. Subterfuges by which a corporation allowed its profits to be diverted to those owning it, though not in the form of dividends would manifestly not remove from the corporation its feature of profit making. Nor would a mere declaration in its certificate of incorporation that it was organized not for profit, be sufficient to stamp upon it a non-profit character . . . . The term 'profit' as employed in the section under discussion means gains or earnings that are expected to come into the possession of a corporation."

A profit of at least 1.5% over the non-member is the stated goal of NFO.

With regard to the 5% provision in the master contracts, [R. pp. 5-21 (Exhibit F)] the members had every right to know that Congress has passed laws with severe penalties to violators, which our courts have unanimously interpreted for over thirty years, which will not allow both a selling and a buying service to opposite sides of the same sales transaction to be combined in one person because it would open a wide field for fraud and oppression, in making up their own minds as to the benefit of their bargain in joining NFO. See, *Great Atl. & Pac. Tea Co.* vs. *FTC,* 106 F. 2d 667 (1939); *Quality Bakers of America* vs. *FTC,* 114 F. 2d 393 (1940); *Oliver Brothers* vs. *FTC,* 102 F. 2d 763 (1939); *Kentucky Rural Elec. Coop. Corp.* vs. *Maloney Elec. Co.,* 175 F.S. 250 (1959). See also, Trade Practice Rules for the Fresh Fruits and Vegetables Industry, 30 Fed. Reg. 5331 & 5332 (1965).

Some might feel I should not have included the foregoing on the 5% provision, because this falls within the class of justiciable issues. I would be the first to agree if it were truly a valid justiciable issue of first impression and a favorable decision could resolve NFO's problems. Even though we assume for the moment there is no violation of the anti-trust laws, and NFO can get and keep the 5% it will be receiving from processors, NFO is still doomed to fail. This fund must belong either to NFO or its members. If NFO proves the fund belongs to its members, and therefore does not fall within the prohibitions of either Section 504.10 of the Iowa Code or Article IX of NFO's Articles of Incorporation, in so doing it will have proven it is on a for profit basis and subject to having its corporate charter revoked. *State* vs. *Hutterische,* supra; *People* vs. *Universal Service Ass'n,* supra; *Read* vs. *Tidewater Coal Exchange,* supra. If it proves the fund belongs to NFO it will have proven the fund falls within the prohibitions of Section 504.10 and Article IX. *State* vs. *Amana Society,* supra; *People* vs. *Universal Service Ass'n,* supra. If the funds cannot be distributed until dissolution, then its members will be receiving 3% less cash than non-members for their products. There are no farmers joining NFO today with that thought in mind. Hence, the fraud still exists, but the general membership is wholly unaware of it. The officials know this, and are trying to hide this fact and mislead thousands, and ultimately millions, of farmers. This is to say nothing about the tragedy that would exist if everything had continued just as it has in the past, and everyone waited until after master contracts were activated when vast sums of money had been accumulated, and then this suit were filed, either by the plaintiffs, or by processors. to recover damages.

Section 504.8 of the Iowa Code requires that corporations organized for agricultural purposes shall have their articles of incorporation provide a mode by which any member may at any time withdraw therefrom, subject to the rights of creditors of the corporation. However, NFO's articles of incorporation make no provision for this requirement. [R. pp. 5-21 (Exhibit B)] Instead, the membership agreement [R. pp. 5-21 (Exhibit E)] states it is irrevocable for a period of three years, and unless notice of cancellation is given in accordance with the terms of the membership agreement, it is automatically renewed for like periods of time.

Now, let us assume that when these future suits were filed, the decision at that time went against NFO as to the validity of its master contracts. The members promptly take steps to see that the corporation's existence is terminated so they can share upon final dissolution. Who could share therein when claims are filed? The membership agreement and master contracts are intricately connected with each other. If one is deemed to be illegal, then so is the other. See, *Rathke* vs. *Yakima Valley Grape Growers' Ass'n,* (S. Ct. Wash.), 192 P. 2d 349 (1948); *Body-Steffner Co.* vs. *Flotill Products, Inc.,* (Calif.), 147 P. 2d 84 (1944).

Any claim for a distributive share would have to be based upon both an illegal master contract and an illegal membership agreement. As we all know, no court will entertain any kind of an action for either party to the transaction when it is predicated upon an illegal document.

Even if the contracts were deemed to be valid, the result would be the same, because NFO's articles of incorporation do not provide for the requirement set out in

Section 504.8 for a member's right to withdraw at any time. See, *Oklahoma Cotton Growers' Ass'n* vs. *Salyer,* 114 Okla. 77, 243 P. 232 (1926); *McLain* vs. *Oklahoma Cotton Growers' Ass'n,* 258 P. 269 (1927); *Pruitt* vs. *The Oklahoma Steam Baking Company,* 39 Okla. 509, 135 P. 730 (1913). Who else is left to receive the whole fund except the State of Iowa?

In answer to the claim that these questions constitute matters of law or opinion, upon which no action can be predicated for having perpetrated a fraud upon the membership, it is submitted that such an assertion does not apply where it involves a fiduciary relationship such as in the instant situation. See, *Scott* vs. *Burnight,* 131 Iowa 507, 107 N.W. 422 (1906); *Schneider* vs. *Schneider,* 125 Iowa 1, 98 N.W. 159 (1904); *Harris-Emery Co.* vs. *Pitcairn,* 122 Iowa 595, 98 N.W. 476 (1904); *Stephens* vs. *Collison,* 249 Ill. 225, 94 N.E. 664 (1911); *Miller* vs. *Osterlund,* (Minn.), 191 N.W. 919 (1923). This is especially true where the opinions or statements of the fiduciary are made under circumstances such that they may be regarded as amounting to positive affirmations of fact. See the statements of NFO's president in the November 17, 1962, issue of *Prairie Farmer* magazine. [R. p. 94 and attached Exhibit Z] In such cases, they will be treated as representations of fact for purposes of deceit. *Mercer* vs. *Elliott,* 25 Cal. Rptr. 217 (1962). Once again, fraud appears on the face of the record, as set out in my brief to the Court of Appeals. A comparison of the principles set forth in *Harris-Emery Co.* vs. *Pitcairn,* supra, with the instant situation shows they are especially applicable to this question.

Now, let us go back to *Cord* vs. *Smith,* supra, a case relied on by the defendant and the Court of Appeals. I,

too, would like to quote the famous words of Judge Cardoza in *Meinhard* vs. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), in defining the duties of fiduciaries and trustees:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Since the record shows the officials have violated the very authority upon which they rely, and these violations have been set up as the grounds for my disqualification, is it not clear there has been a lowering and undermining of the rule of undivided loyalty by the "disintegrating erosion" of making them a particular exception?

The very nature of farming and the fact that farmers must deal cooperatively with one another for the good of all, necessarily involves a greater and higher degree of trust and confidence in management than that required of regular for-profit corporations where stockholders may or may not receive a dividend on their investment in the company.

Consequently, the extreme and vital importance of requiring management to make a full, fair, and complete

disclosure of all material facts and applicable law to members about their own farm organizations *cannot* be overlooked or ignored.

Now, let us return to the hypothetical set out at the very first of this question. Since I have already informed the membership of this fraud, the question as to whether I should have done so is now moot. However, the question that is now before the Court as to whether I have a duty, or the right, to continue representing the plaintiffs in this case stems from exactly the same principle this Court would have had to apply if my original hypothetical question, where I knew but remained silent, were before it for decision. *Hett* vs. *United States,* supra; *United States* vs. *Hoffa,* supra.

Counsel contends that even though I might have had a duty to inform the membership, this does not mean that I can represent them in this suit. This argument proceeds upon a wrong premise. It is correct to say that if I had a duty, or a right, to tell them about these problems in this particular case, then I had a corresponding duty or right to represent them in seeking timely, corrective declaratory relief on these identical problems.

The controlling principle in *Croce* vs. *Superior Court,* 21 Cal. App. 2d 18, 68 P. 2d 369 (1937), is on all fours with this proposition. The petitioner sought to disqualify the attorney who was representing the adverse party in a law suit. The court said at p. 19 of 21 Cal. App. 2d as follows:

> "And while no cases precisely in point have been cited by either side *it would seem to follow necessarily* that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, *it cannot be held* that under the same circumstances

he is disqualified from serving as an adverse attorney." (emphasis supplied)

When you analyze the District Court's order, [R. pp. 119-120] it reaches the same conclusion as set out in *Croce* vs. *Superior Court,* supra, except on the other side of the matter. By enjoining me from taking any further action, directly or indirectly, it follows necessarily from the District Court's order that I should never have disclosed this fraud and illegality to the membership. However, let us assume some other attorney filed this suit and subpoenaed me as a witness. In addition to the cases heretofore cited which show beyond a doubt I would have been permitted to testify, I would refer to the old English classic of *Annesley* vs. *Earl of Anglesea,* Howell's State Trials, Vol. 17, p. 1139 (1743), the controlling principle of which would apply to this hypothetical.

This was a suit for *ejectment* where a nephew claimed vast estates held by his uncle as the supposed heir of his deceased brother, who was the father of the plaintiff. The young nephew claimed to have been kidnapped in his youth by contrivance of the uncle and shipped to the colonies. Returning from his servitude, he filed this suit. Meanwhile, however, while hunting with friends, he killed a game keeper. The uncle then employed an attorney to start a prosecution for murder, saying, "I would give 10,000 pounds to see him hang." This particular statement was sought to be proved from that attorney's testimony against the uncle *in the ejectment suit.* An objection was made that this statement was not made in connection with a defense in that suit. Furthermore, it was confidential and could not be disclosed.

Sergeant Tisdall, attorney for the plaintiff, argued that if he was employed as an attorney in an unlawful or

wicked act *his duty to the public obliged him to disclose it.* He said that no private obligations could dispense with that universal one which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason he apprehended that if a secret that is contrary to the public good, such as a design to commit treason, murder, or perhaps perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, *the obligation to the public must dispense with the obligation to the client.*

The defendant's lawyer, *Mr. Harward,* argued just the opposite. Judge Mounteney, B. said at page 1241 as follows:

> "For God's sake then let us consider, what will be the consequence of the doctrine now laid down, (by the defendant) and so earnestly contended for, that such a declaration made by any person to his attorney, ought not by that attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offense; he is desirous and determined, at all events, to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned, (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove

> this, in order either to bring the guilty party to condign punishment, or *to prevent* the evil consequences of his crime with regard to civil property. *Is this law? Is this reason? I think it is absolutely contrary to both.* . . . The declaration now offered to be proved, is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, *attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known.*" (emphasis supplied)

Mankind is interested in what I uncovered. It is difficult to imagine an attorney having a much greater obligation to society in general, prior and superior to any obligation I could lie under to the officials of NFO, to make this fraud known and of the plans and ever-increasing likelihood of placing from 60% to 100% of our nation's food supply under illegal arrangements, which are bound to end up wrong, regardless of which way one argues.

When the District Court's order is extended to its ultimate conclusion, it necessarily holds that no attorney who ever represented NFO could be admitted to prove this in order to prevent these consequences. Otherwise, I would not have been disqualified. Therefore, it would be absolutely contrary to both law and reason, that when I was subpoenaed as a witness by the other attorney, for the District Court to rule I was not permitted to testify.

Now, let us further assume that instead of this other attorney calling me as a witness I was either employed to take over the case for the plaintiffs or file it originally, as I have done. This throws *Groce* vs. *Superior Court*, supra, *directly on point* and proves that error was committed when the Court of Appeals affirmed the District

Court's order disqualifying me as plaintiffs' counsel in this particular case. This error was compounded when the Court of Appeals denied my petition for rehearing. I have contended from the beginning, and emphasized this in my oral argument, that the fraud in the record created an exception to any existing attorney-client privilege.

Counsel for NFO also recognized on oral argument that the Court would have to decide if this created such an exception. However, it cannot be determined from the Court of Appeals' original opinion whether it considered this fraud as such exception and decided against it. Therefore, the petition for a rehearing was filed, which specifically pointed out, among other things, that this question had either been overlooked or ignored and the consequences of so doing.

The Court of Appeals should have granted a rehearing, even though we assume this was the first time the fraud or illegality was disclosed or pointed out. This proposition is supported by the rationale of the line of cases represented by *McMullen* vs. *Hoffman,* 174 U.S. 639 (1899); cf., *Primeau* vs. *Granfield,* 193 F. 911 (1911); *Memphis Keely Inst.* vs. *Leslie E. Keeley Co.,* 155 F. 964 (1907); *Teoli* vs. *Nardolillo,* 23 R.I. 87, 49 A. 489 (1901).

Even though I have feelings the same as anyone else, I hasten to add I am not thinking of myself in bringing this appeal. This fact should be obvious. I voluntarily withdrew [R. p. 115] and offered my affidavit under the penalties of contempt that I would not have another thing to do with this case in any way so the plaintiffs could employ other counsel of their own choice [R. pp. 116-118] and expedite the case on the merits for the good of all concerned. [R. pp. 121-122] However, when counsel still insisted upon an order disqualifying me notwith-

standing, [R. pp. 119-120] and it became apparent that one would be entered, I had to re-enter my appearance [R. p. 125] in order to be able to appeal that order. If it were left to stand, it would overturn the whole doctrine that fraud constitutes the exception to an attorney-client privilege, and it would open the door to similar kinds of fraudulent activity across the country against farmers.

I knew that a decision on the merits should be expedited, and the Court of Appeals agreed when it granted my petition to expedite on its calendar. Even so, before I appealed, I could not escape the fact that unless I did appeal from the District Court's order, its effect would remain with all of us as a by-product of the case in chief, long after it has been disposed of and regardless of its final result.

I have no desire to fight the way this case has gone. However, from the time I uncovered this, there has been no way for me to dispose of it. This fact still remains, but now for a different reason. If the District Court's order becomes the law, then not only is my predicament typical of the general condition in which other members of our profession will find themselves, but it will encourage similar or possibly worse activity by others who are so inclined. Furthermore, this will be done under such conditions that members of our profession will be the only ones likely to detect it. Herein lies the great harm that will be done as a result of this order, unless it is reversed and my reinstatement as plaintiffs' counsel is ordered by this Court. As an officer of this Court, I could not let this happen on my own initiative.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the Petition for Review because the Court of Appeals has rendered a decision contrary to the rationale in *Hett* vs. *United States,* supra. This Court denied certiorari, 384 U.S. 905 (1966), because Hett *did not tell* what he knew about a crime that was to be committed in the future. It would be in direct conflict with that decision to deny this petition for a writ of certiorari, because *I did tell* the members about a fraud to be committed when master contracts are activated. The effects of the order of the Court of Appeals, when viewed in terms of *Hett* vs. *United States,* supra, and *United States* vs. *Hoffa,* supra, will make it impossible for an attorney to do the right thing, since the attorney-client relationship offers no shield to either the client or the attorney if the client has been engaged in a fraudulent scheme to be committed in the future. See also, *Grummons* vs. *Zollinger,* (Ind.), 240 F.S. 63 (1964), which held that the sanctity of communications between an attorney and client is not required to be maintained in a situation where it is made in furtherance of crime or fraudulent scheme or activity yet to be performed.

The order of the Court of Appeals is also in direct conflict with *McMullen* vs. *Hoffman,* supra. That case said the principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation. One does not have to read past the motion for my disqualification to see that it is founded upon the affidavit of NFO's president, which proves a violation of the law amounting to a fraud upon the membership.

The decision of the Court of Appeals is in direct conflict with the line of cases represented by *Primeau* vs.

Granfield, supra. That court said it had a duty to examine into charges of fraud and illegality. When they were disclosed in a case, the law is required to refuse its aid, regardless of the fact that with the fraud and illegality absent, the plaintiff might appear entitled to relief. In the instant situation, the Court of Appeals either refused to examine into or it ignored the fraud which is disclosed on the face of the record. This is especially true since these facts were again pointed out in the petition for a rehearing, which was denied.

The decision of the Court of Appeals is in direct conflict with the line of cases represented by *Memphis Keely Inst.* vs. *Leslie E. Keeley Co.,* supra, which held that the court had to recognize the fraud in order to discourage fraud and wrongdoing upon the public. The order sought to be reviewed in the instant situation will not only encourage such activity, but it will silence members of our profession from doing what Canons 16, 32, and 41 and the law require of them under the penalties of *Hett* vs. *United States,* supra, and *United States* vs. *Hoffa,* supra.

The decision of the Court of Appeals confines and limits the definition of what constitutes fraud as set out in *Isaacs* vs. *United States,* supra; *Gibbons* vs. *Brandt,* supra; *Pittman* vs. *Lageschulte,* supra; *Allen Realty Co.* vs. *Uhler,* supra; *Securities & Exchange Commission* vs. *Capital Gains Research Bureau, Inc.,* supra; and especially *Berger* vs. *Amana Society,* supra.

The decision of the Court of Appeals is in direct conflict with the rationale of the line of cases represented by *Jacuzzi* vs. *Jacuzzi Brothers, Incorporated,* supra. Unless this order is reversed, there will be no way for corporate counsel to represent his client in such circum-

stances as these. The corporation cannot do it alone. If the officers will not act, and counsel cannot reach its governing body to inform them, then the only ones left are the members, and as was said in *First Nat. Co.* vs. *C.I.R.*, 289 F. 2d 861 (1961), the ones to whom fiduciary duties are owed are the only ones that have a right to set a breach of these duties straight. If, under these circumstances, counsel cannot tell its members, who really make up the organization, then there will be no way for them to know about matters until after the damage is done. This will place farmers at the complete mercy of those in positions of trust and confidence to whom they must look for guidance in sustaining their very existence. The offer of proof contains typical examples of what can be expected.

This case is analogous to prosecuting a man for murder. The defendant admits killing the person involved, but he says, and the record proves, he did it in self-defense. Nevertheless, the court orders his execution without so much as commenting on the question of self-defense. Thereupon, the defendant asks the court, "What about my defense of self-defense?", and the court merely says, "Hang him!"

Every lawyer and every bar association across our land, even though they may not yet know about this case, are vitally interested in knowing whether fraud now constitutes the exception to the attorney-client privilege. Every farm organization wants to know what its duties are to their members. Every farm corporation's counsel wants to know what they must do and what they cannot do in representing their corporate client's best interests when they discover its officers are perpetrating a fraud upon its membership, and their corporate client's struc-

ture, when viewed in terms of its stated plans, reveals it is bound to fail, regardless of which way it goes.

It is clear to see that the order of the Court of Appeals has uprooted and overturned some of the most basic and fundamental principles which govern our whole society. The law cannot permit, much less require, the abandonment of the controlling legal precedents herein cited, which hold that in the final analysis, fraud must constitute an exception to the attorney-client privilege if there is to be any semblance of maintaining the honor of our profession and making an officer of the Court an agency to advance the ends of justice, rather than to be used as an instrument to subvert them.

The order of the Circuit Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Attorneys for Petitioner.

WILLIAM D. HALL,
Petitioner.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS, 60604

May 31, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 16232

ROLAND WATERS, et al.,
Plaintiffs,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,
Defendant.

WILLIAM D. HALL,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,
Respondent.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

APPENDIX I

This appeal from an order of the District Court disqualifying and enjoining the petitioner, William D. Hall,

and the law firm with which he is associated, from participating directly or indirectly as counsel for the plaintiffs in Civil Action No. IP-66-C-440 (Roland Waters, et al., v. National Farmers' Organization, Incorporated) pending in the District Court comes before this Court pursuant to leave granted under the provisions of 28 U.S.C.A. §1292(b).

This Court having considered the petition for leave to appeal and attached documents, respondent's answer thereto, and the record certified to this Court by the District Court as well as the memorandum briefs filed by the respective parties, and having heard oral arguments in open court by counsel for the parties, and having taken the matter under advisement for decision, the Court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order from which this appeal was allowed is supported by the record herein and the law appertaining thereto.

And, in this connection, the Court is of the opinion that the rationale of Consolidated Theatres v. Warner Bros. Circuit Management Corporation, 2 Cir, 216 F. 2d 920; Cord v. Smith, 9 Cir., 338 F. 2d 516; and T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., D.C. S.D.N.Y., 113 F. Supp. 265 is dispositive of the controlling issue presented for determination herein, the record before the District Court having disclosed that the matters embrace within the pending suit are closely and substantially related to a subject matter included within the petitioner's previous representation of National Farmers Organization, Incorporated.

WHEREFORE the order from which this appeal was allowed is affirmed and the clerk of this Court is directed to enter the judgment of the Court accordingly.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS, 60604

Monday, June 26, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 16232

ROLAND WATERS, et al.,
Plaintiffs,

vs.

NATIONAL FARMERS ORGANIZATION, INC.,
Defendant-Appellee,

APPEAL OF WILLIAM D. HALL,
Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

APPENDIX II

IT IS ORDERED by the Court that the petition for a rehearing of this cause filed by the appellant herein, be, and the same is hereby, DENIED.